No. 2452

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, AS TRUSTEE,
Appellee,

vs.

PACIFIC COAST PIPE COMPANY, A CORPORATION,
Appellant,

and

KINGS HILL IRRIGATION & POWER COMPANY, ET AL.,
Defendants.

BRIEF OF APPELLEE.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

LEVY MAYER,
Chicago, Ill.,
CHARLES L. POWELL,
Chicago, Ill.,
RICHARDS & HAGA,
Boise, Ida.,
Solicitors for Appellee.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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KINGS HILL IRRIGATION & POWER COMPANY, ET AL.,
Defendants.

STATEMENT.

The statement of appellant which precedes the specifications of error in the brief of appellant, is in the main correct; but the exact question upon which the rights of the parties must turn is not as therein set forth.

Counsel says on page 3 of the statement:

> "The principal contention was between appellant and appellee as to the priority of their respective liens, and this was treated by the trial court as the controlling question in the case."

The statement is not accurate as to the question which was before the court. It is true the principal contention in the case was between the Pacific Coast Pipe Company,

the appellant here, and the Trustee Bank, but the contention of the Bank was not that its lien was prior to the lien of the appellant, but on the other hand, its contention was (1) that the lien of the appellant, if any it ever had, had expired by the very limitations of the statute under which it was claimed prior to the filing of the cross bill in this case for its enforcement; and (2) that if this were not true that appellee's lien by virtue of its mortgage was superior to the lien of appellant. The lien of the Pacific Coast Pipe Company, the appellant, was asserted under the Idaho statutes, certain sections of which are set out in the appendix to appellant's brief.

To a clear understanding, however, of the mechanic's lien laws of Idaho, it is necessary that one other section of the Idaho statute be before the court, and for convenience we set it out at this point:

> "Sec. 5115. Every original contractor claiming the benefit of this chapter must, within ninety days, and every other person must, within sixty days, after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or in case he cease to labor thereon before the completion thereof, then after he so ceases to labor or after he has ceased to labor thereon for any cause, or after he has ceased to furnish materials therefor, or after the performance of any labor in a mine or mining claim, file for record with the county recorder for the county in which such

property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of the claimant, his agent or attorney, to the effect that the affiant believes the same to be just."

It will be necessary to bear in mind certain specific dates which affect the interests of the parties:

The mortgage was executed November 2, 1908, and recorded December 9, 1908, and a certain amendment of the mortgage was executed March 1, 1909, and recorded March 19, 1909. The appellant, the Pacific Coast Pipe Company commenced furnishing material on the 13th day of July, 1909,—long after the mortgage and amendment were executed and recorded, and continued to furnish material up to the 2nd day of July, 1910. The Pacific Coast Pipe Company's claim of lien was filed August, 4, 1910, in Elmore County and August 5, 1910, in Owyhee County,—within sixty days after the last material was furnished in accordance with the provisions of the Idaho statute above quoted.

On October 31, 1910, the Pacific Coast Pipe Company commenced an action for the enforcement of its lien in

one of the courts of Idaho, making as sole defendant thereto the King's Hill Irrigation and Power Company, and such proceedings were had in that case that the lien was foreclosed and the property of the irrigation company on which the lien was asserted was acquired by the Pacific Coast Pipe Company through a master's deed prior to the trial of this case in the court below. It is to be noted at this point that appellee's trust deed creating a lien upon the same property was of record at time this suit was brought in all the counties where the property was situated (including the county where the suit was brought to foreclose the lien) and yet the trust company (appellee) was not made a defendant.

No effort to foreclose the lien of the Pacific Coast Pipe Company, as against the appellee, Continental and Commercial Trust and Savings Bank, whose mortgage or trust deed had been of record since 1909, was made until the cross bill was filed in this suit on the 25th day of March, 1913 (Rec., 64-95)—more than two years and six months after the lien was filed.

Turning now to Section 5118 of the Idaho statutes set out by appellant on page 56 of its brief, it will be seen that it is there provided:

> "No lien provided for in this chapter *binds any building, mining claim, improvement or construction for a longer period than six months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien,*

or if a credit be given, then six months after the expiration of such credit; but no lien shall continue in force under this chapter for *a longer period than two years from the time that the work is completed or credit given, unless proceedings to enforce the same shall have been commenced.*"

It is thus seen that the statute provides that no mechanic's lien binds the property for more than six months after the claim was filed, unless proceedings be commenced; and again it provides that no lien shall continue in force for a longer period than two years from the time that the work was completed, unless proceedings to enforce have been commenced.

As above pointed out, the lien of the appellant was filed in Elmore County on August 4, 1910, and in Owyhee County on August 5, 1910, and the work was completed and last credit given on July 2, 1910, and appellant's cross bill to enforce the lien as against appellee was filed March 25, 1913.

It reasonably appears from the amended trust deed which, as above pointed out, was recorded March 19, 1909, that the system at that time was substantially complete. At any rate it was completed to the extent of delivering water to the lands embraced in the water contracts theretofore deposited with the Trustee as security for the bonds. The appellant did not commence to furnish any material until July 13, 1909, and the material which was by him furnished was used for two small lat-

erals, one known as the King's Hill syphon which carries water across Snake River in Elmore County for irrigating lands in the townsite of King's Hill and the vicinity thereof, which lands form no part of the irrigation project as originally comtemplated. (Swensden Trans., 309.) The balance of the material was used in a pipe line known as the Tuana Gulch which is simply a short lateral extending from the main system and irrigates a small tract of land. (Swensden Trans., 306 *et seq.*)

There is absolutely no evidence that any part of the system was constructed over Government land or land to which both the legal and equitable title still stood in the United States Government. The evidence is rather to the contrary. The King's Hill syphon was constructed over private land (Trans., 309), presumably by an agreement with the then owner as to the right of way. The Tuana Gulch was probably constructed over Carey Act land, and there is not the slightest evidence to show that the title to the right of way was acquired because the pipe line was constructed over it.

There can be no foundation for the contention made by appellant that the title to the irrigation system was dependent upon the construction of the two small pipe lines (Trans., 307), and that such title became vested in the King's Hill Irrigation Company because of the construction of the pipe line. We call on counsel to show where in the record there is evidence that the title to the

rights of way was in any wise dependent upon the construction of the pipe lines for which appellants furnished material.

It becomes apparent then from this statement that before appellant can succeed he must successfully maintain the proposition that the mechanic's lien is superior to the lien of the trust deed—a proposition dependent solely upon his claim that the right of way came to the company by virtue of his work; and if he successfully maintains that proposition, then he must maintain the additional proposition that his lien had not expired as to the mortgagee at the time he filed his cross-bill to foreclose.

BRIEF.

I.

ONE SEEKING THE ENFORCEMENT OF A MECHANIC'S LIEN MUST BRING HIS PROCEEDINGS FOR ENFORCEMENT THEREOF WITHIN THE TIME LIMITED IN THE STATUTE CREATING THE LIEN AS AGAINST ALL PARTIES INTERESTED IN THE PROPERTY SOUGHT TO BE HELD.

Davis v. *Bartz* (Wash. 1911), 118 Pac., 334.

Smith v. *Hurd*, 50 Minn., 503; 52 N. W., 922.

Falconer v. *Cochran* (Minn.), 71 N. W., 386.

Boylan v. *Cameron*, 126 Ill. App., 432.

Rockel on Mechanic's Liens, Sec. 213.

Dunphy v. *Riddle*, 86 Ill., 22.

Smith v. *Barrett*, 41 Mo. App., 460.

Crowl v. *Nagle*, 86 Ill., 437.

Denver & R. G. Ry. v. *Wagner*, 167 Fed., 75.

The Harrisburg, 119 U. S., 199.

Stern v. *LaCompagnie*, 110 Fed., 996.

Peters v. *Hanger*, 134 Fed. (4 C. C. A.), 586.

Arnson v. *Murphy*, 115 U. S., 579.

Deming Colburn Co. v. *Union National Savings Assn.* (Ind.), 51 N. E., 936.

Union National Bank v. *Helberg* (Ind.), 51 N. E., 916.

Stoermer v. *Peoples Bank* (Ind.), 52 N. E., 606.

Green v. *Sanford* (Neb.), 51 N. W., 967.

Ballard v. *Thompson* (Neb.), 58 N. W., 1133.

Badger Lumber Co. v. *Staley* (Mo.), 125 S. W., 779.

U.S. vs. Kessler, 218 Fed. 67.
U.S. vs. Texas &c. Co. 233 U.S. 157.

II.

WHILE MECHANIC'S LIEN STATUTES ARE TO BE LIBERALLY CONSTRUED FOR THE ACCOMPLISHMENT OF THEIR PURPOSE, ONE SEEKING THE BENEFIT THEREOF MUST BRING HIMSELF WITHIN THE FOUR CORNERS OF THE STATUTE.

Russell v. *Hayner* (C. C. A. 9th Circuit), 130 Fed., 90.

Reynolds v. *Manhattan Trust Co.* (C. C. A. 8th Circuit), 83 Fed., 593.

III.

NOR IS IT NECESSARY FOR A DEFENDANT WHO RELIES UPON THE PROPOSITION THAT SUIT WAS NOT INSTITUTED WITHIN THE TIME LIMITED BY THE STATUTE TO PLEAD SUCH FACT IN DEFENSE OF THE ACTION, WHERE AS IN THIS CASE THE TIME LIMITED IS A PART OF THE RIGHT.

Davis v. *Bartz, supra.*

Denver & Rio Grande Ry. v. *Wagner, supra.*

The Harrisburg, supra.

Stern v. *LaCompagnie, supra.*

Arnson v. *Murphy, supra.*

ARGUMENT.

Appellant's statement in the argument on page 16, that

> "It is conceded in the opinion of the trial court that the appellant's lien as a material man has priority over the appellee's mortgage"

is gratuitous. Reference to the opinion appearing on page 416 of the transcript will convince the court of the accuracy of our statement as to the gratuitous character of this statement. The court never had occasion to pass upon the question of the priority of the two liens, as it was found that the appellant's lien had expired by virtue of the statute.

It is true, as is apparent by a reference to page 418 of the transcript, that, in the case of *Utah Implement Vehicle Co.* v. *Bowman,* from the opinion in which case an excerpt is added by the court to the opinion in this case, that was the precise question in that case; but as above pointed out, the court having found in this case that the appellant had no lien, the concession was never made by the court or any one else that the lien of appellant was superior to the lien of the trust deed.

Two contentions are made by appellant for reversal:

First: The mechanic's lien of the appellant had not expired by operation of law at the time the cross bill was filed.

Second: The mechanic's lien of the appellant is superior to the lien of the trust deed.

I.

THE MECHANIC'S LIEN OF THE APPELLANT HAD EXPIRED BY OPERATION OF LAW, AT THE TIME THE CROSS BILL WAS FILED.

The manifest errors into which counsel has fallen, in the argument, arises from a failure to appreciate the character of the rights created by mechanic's lien statutes. Counsel confuses the statutory mechanic's lien with equitable liens created by mortgage or otherwise. He loses sight of the fact that the lien rests entirely upon the statute of the state, and while it has some equitable characteristics, it is purely the creature of the statute and can only be availed of in the manner and upon the conditions specified in giving the lien.

Witherow Lumber Co. v. *Glasgow Investment Co.* (C. C. A. 4th Circuit), 101 Fed., 863, 42 C. C. A., 61.

1 Pomeroy's Equity, 167.

Counsel likewise loses sight of the fact that the six months' limitation in regard to the filing of the claim for lien, and the two-year limitation for bringing a suit, contained in the Idaho statute, are not statutes of limitation, but are a part of the right. This distinction is well pointed out in *Bear Lake Irrigation Company* v. *Garland,*

164 U. S., 1, 14, cited by counsel, where it is said with reference to a mechanic's lien statute:

> "It may be assumed that where a statute creates a right not known to the common law and provides a remedy for the enforcement of such right and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right and must be pursued within the time prescribed or else the right and remedy are lost."

As is well said by a learned text writer on mechanic's liens:

> "A lien claimant must bring himself within the provisions of the statute creating his lien rights and then he must have complied with the conditions bringing the right to a perfected lien before he can enforce any lien claim."

Rockel on Mechanic's Liens, Section 200.

Counsel's contention on page 20 of the brief, that there are two lines of decisions which are irreconcilable, is without support so far as we are able to read the cases, when the true character of a statutory mechanic's lien is kept carefully in mind. Counsel is entirely in error when he says that appellee's theory was that a subsequent incumbrancer is an indispensable party to a mechanic's lien foreclosure suit. No such contention was made in the court below, nor is any such contention made here. Our contention there was, and our contention here is, that if one holding a lien on the property on

which the material man or laborer asserts a lien, *is not made a party to the proceedings required by the statute to enforce said lien within the time limited by the statute, that as to such lienor, the mechanic's lien expires by its own limitation upon the expiration of the time limited for doing that which is necessary to be done under the statute to give effect to the lien.*

Counsel is led astray in citing the Iowa cases as indicating one line of authority with reference to mechanic's liens, by reason of his failure to distinguish the fact which is perfectly patent under an examination of the Iowa statutes, that the statute there with reference to the time within which a mechanic's lien must be enforced, is a part of the general statute of limitations and there is no limitation in the statute granting the right to a mechanic's lien and making the remedy a part of the right.

Code of Iowa 1897, Chapter 8, Sections 3088-3098.

Code of Iowa, Section 3447.

The whole discussion of counsel on the theory of the rights of junior incumbrancers in mortgage foreclosures, falls to the ground when it becomes apparent that the statute here is not a statute of limitations. That counsel does treat the limitation here not as a part of the remedy but as a statute of limitations, becomes apparent in his discussion on pages 26-30, of the case of *Frates* v. *Sears*, 144 Cal., 246, 77 Pac., 905, and his pronouncement of the Idaho rule as is held in *Kelly* v. *Leachman*, 3 Ida., 629.

As he well says, the Idaho rule is that the statute of limitations does not extinguish the debt but merely operates to bar the remedy; but such rule has no application in the instant case for the reason that the limitation of the time when the action must be brought is part of the right. It is not a statute of limitations in any respect. If the action is not brought within the time in the words of the statute, "the lien no longer binds the property." It is gone.

The case of *DeLaVergne Refrigerating Co.* v. *Montgomery Brewing Co.,* 6 C. C. A., 272, 57 Fed., 111, went upon the permissive character of the statute there under consideration, to the effect that other interested parties may be made parties. The court was of the opinion that incumbrancers were governed solely by the section of the statute which permitted them to be made parties. The case had no predecessor and has never been followed, or even cited except by Judge Dietrich in the Bowman case though decided in 1893.

If the DeLaVergne case is authority for the position of counsel, it stands alone and is opposed to the great weight of authority, except as it has some support from the case of *Monk* v. *Exposition Company,* 68 S. E., 280, referred to in the opinion of the court below and discussed somewhat by counsel in the brief. It is contrary to reason and a long line of well considered authorities.

Thus under a mechanics' lien statute in Washington, substantially like the Idaho statute, it is held that one

suing to enforce a lien must allege and prove that the action was begun in time as against all the parties sought to be bound. In the case in question, a mortgage had been taken on the property during the progress of the work, for which the lien was claimed. The material man foreclosed his lien within the time limited by the statute, but did not make the mortgagee a party, and such mortgagee did not appear therein. About two years after the filing by the contractor of his lien, the assignee of the mortgage brought suit to foreclose the mortgage, and in this suit it was held that the mortgagee was a proper party in the lien foreclosure suit, and, therefore, his interest would not be affected thereby, and the rights of the material man were subject to the mortgage lien, *because such lien had expired as against the mortgagee before suit to enforce it was brought.*

Davis v. *Bartz* (Supreme Court of Washington, Oct. 24, 1911), 118 Pac., 334.

The reasoning in the last above cited case is so conclusive, and so appropriate to the situation here, the statutes being in effect identical, that we quote at length from the opinion, as follows:

> "1. No action was commenced to foreclose the lien as against the respondent, Davis, within the life of the lien. The statute (Rem. & Bal. Code, Sec. 1138), provides that : 'No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the

proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit. * * * Since the lien expires by force of the statute, unless action be commenced within the statutory time, it is necessary to the pleading and proof of a valid lien that the complaint allege and evidence show that the work was done or materials furnished within that time, or the action cannot be maintained. This necessarily results from the wording of the statute, as construed by this court in a number of decisions. *Rees* v. *Wilson,* 50 Wash., 339, 97 Pac., 245; *Northwest Bridge Co.* v. *Tacoma Shipbuilding Co.,* 36 Wash., 333, 78 Pac., 996; *Peterson* v. *Dillon,* 27 Wash., 78, 67 Pac., 397; *Powell* v. *Nolan,* 27 Wash., 318, 67 Pac., 712, 68 Pac., 389.

2. It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it, if the facts do not warrant the lien. The claimant must accord this opportunity within the time limited or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority, if the evidence warrants either defense. He is entitled to

his day in court upon these matters within the period fixed by the statute. In this respect, there is no valid distinction between necessary parties and proper parties. *Union Nat. Savings & Loan Ass'n* v. *Helberg,* 152 Ind., 139, 51 N. E., 916.

It follows of necessity that any one interested, whether as owner, mortgagee, lien claimant, or otherwise, anyone who may defend against the lien, or show by competent evidence that it is not a lien as against his interest, has the right to invoke the statute; if the action be not commenced as *against him* within the statutory period. So read the better-considered authorities in construing similar statutory provisions. 'As to each defendant in an action, the action is commenced and is pending only from the time of service of the summons on him, or of his appearance without service; and, where each may object that the action was not commenced within the time limited by statute, its commencement as to his objection is to be determined by the time of service on him, and not by the time of service on some other defendant. This is a rule applicable to every action, and applies as well to actions to enforce mechanics' liens as to any others. And any one who may defend against such a lien, who may show that for any reason it is not a lien as against his interest, may object that the lien had expired, or the remedy upon it had been lost by lapse of time, before the action was commenced against him.' *Smith* v. *Hurd,* 50

Minn., 503, 52 N. W., 922, 36 Am. St. Rep., 661. 'But counsel for appellee contend that, however true it may be that the lien of the lumber company was prior to that of the mortgagee at the time of the foreclosure of the former, yet such priority could last only during the life of the mechanics' lien. This, we think, must be admitted. The statute (section 7259, Rev. St., 1894; Section 5297, Rev. St., 1881; section 5297, Horner's Rev. St., 1897), gives one year from the time when notice is filed in the recorder's office, or, if a credit is given, one year from the expiration of such credit, during which time suit may be brought for the enforcement of a mechanics' lien; and it is there expressly provided that, "if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void." If the lien in this case had not been foreclosed within the year given by the statute, it is clear that it would have been void as to all persons concerned, including the mortgagee. But, while the lien was duly foreclosed as against the owner of the property, yet, as we have seen, the appellee, as mortgagee, not having been made a party to the action, its rights were in no manner affected thereby; that is, appellee's mortgage stands just the same as it would have stood if the mechanics' lien had not been foreclosed within the time prescribed by the statute. In other words, the year given by statute having expired without a foreclosure of the lien as against the mortgage, the

lien itself, and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot after the expiration of the year, when the statute declares it shall be void. By its foreclosure, the lienholder, not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and, as such owner could not question the right of the mortgagee to foreclose against the property, neither can the lienholder now do so; the year given him by statute to foreclose his lien having expired. It would, of course, be different if the time for the foreclosure of a mechanic's lien were not limited by the statute.' *Deming-Colborn Lumber Co.* v. *Union Nat. Savings & Loan Ass'n,* 151 Ind., 463, 469, 51 N. E., 936, 938, 939; *Hokanson* v. *Gunderson,* 54 Minn., 499, 56 N. W., 172, 40 A. St. Rep., 364; *McGraw* v. *Bayard,* 96 Ill., 146; *Dunphy* v. *Riddle,* 86 Ill., 22; *Husted* v. *National Home Building & Loan Ass'n,* 152 Ind., 698, 51 N. E., 1067; *Union Nat. Savings & Loan Ass'n* v. *Helberg,* 152 Ind., 104, 139, 51 N. E., 916; *Stoermer* v. *People's Savings Bank of Evansville, Indiana,* 152 Ind., 104; 52 N. E., 606; *Krontz* v. *Beck Lumber Co.,* 34 Ind. App., 677, 73 N. E., 273; *Ward* v. *Yarnelle,* 173 Ind., 535, 91 N. E., 7; *Green* v. *Sanford,* 34 Neb., 363, 51 N. W., 967; *Ballard* v. *Thompson,* 40 Neb., 529, 58 N. W., 1133; *Pickens* v. *Polk,* 42 Neb., 267, 60 N. W., 566; *Goodwin* v. *Cunningham,* 54 Neb., 11, 74 N. W., 315.''

Davis v. *Bartz, supra.*

In one of the Minnesota cases cited in the above quotation, it is held that by beginning an action against the owner, within the time limited by the statute (it was two years in Minnesota) such action was not thereby begun within proper time as to a lienholder, and it is there said:

> "And anyone who may defend against such a lien, who may show that for any reason it is not a lien as against his interest, may object that the lien had expired, or the remedy upon it had been lost by lapse of time, before the action was commenced against him. * * * It amounts to just this: that when an action is commenced as to any defendant there must be an existing cause of action against him, and the right to a remedy upon it."
>
> *Smith* v. *Hurd,* 50 Minn., 503, 52 N. W., 922.

In another case arising in Minnesota, a material man brought an action, in 1894, and made the mortgagor, who was the owner of the property, a party defendant, and named Falconer, the mortgagee, as a defendant, but the summons was never served on him, and he never appeared in the action. The question arose subsequently, when Falconer was in court properly, as to whether or not the mechanic's lien continued as to him, and the court said:

> "Black (the material man) has never foreclosed or enforced his lien as against the plaintiff (the mortgagee). The commencement of an action for that purpose against the owner of the equity of re-

demption, Walsh, did not preserve the lien as against the plaintiff. (Citing *Smith* v. *Hurd, supra.*) The time for commencing such an action had expired long before the commencement of the present action. Hence all that is now left to Black is to stand in the shoes of Walsh, the mortgagor, as owner of the equity of redemption from plaintiff's mortgage."

Falconer v. *Cochran,* 71 N. W., 386.

In a case arising in Illinois, the rule that the proceeding by which a mechanics' lien is sought to be enforced must be instituted within the time fixed by statute or such proceeding will fail, was declared applicable even where the proceeding is by cross bill, interposed in an action brought by another party, and the court there, quoting from a prior case in the Supreme Court of Illinois, said:

"The remedy by a mechanics' lien is cumulative to the ordinary remedy given by the common law, and is a privilege enjoyed by one class of the community above all other classes; and therefore, a party seeking to enforce it must bring himself strictly within the terms of the statute. Nothing can be inferred in his favor, but the law must be strictly construed. (Citing *Freeman* v. *Rinaker,* 185 Ill., 179.)"

Boylan v. *Cameron,* 126 Ill. App., 432.

The statute under construction in the last above cited case provided that no petition shall be filed or suit commenced to enforce the lien, unless the same is commenced

within four months after the time the final payment is shown to be due the contractor. The court, in disposing of the case, said:

> "This section called upon Boylan to begin his suit within four months from July 17, 1900, if he wished to have the benefit of the act. This privilege expired November 17, 1900. His cross-bill in form of an answer, was not filed until December 20, 1900. Clearly this was too late."
>
> *Boylan* v. *Cameron, supra.*

In Illinois the statute did not say, in terms, against whom the suit shall be commenced within six months, its language being "unless suit be instituted to enforce such lien within six months."

The following is laid down as the general rule by a high class text writer on mechanics' liens:

> "As a general rule, the mechanics' lien statutes fix the time within which an action to foreclose shall be brought, and, as a matter of course, if the action is not brought within that time, it will fail. When the case clearly is not within the statutory limit, consideration of equity will not prevail over statute and extend the time, nor may statutory provisions relating to the time of foreclosure be waived, unless the conduct of the parties is such as will permit of no other conclusion."
>
> *Rockel on Mechanic's Liens,* Sec. 213.

In another Illinois case Gallaher held a mortgage of

record. As to the owner, a mortgagee company and another, the suit was begun within six months, as provided by the statute, but Gallaher was not made a party defendant to the suit until four days after the expiration of the six months, and it was there contended that it was only needful to commence the suit to enforce the lien against the owner of the property within six months, and that at any time afterwards and after the expiration of the six months, any creditor or incumbrancer could be made a party defendant, and the lien enforced against him, but the court said:

> "We cannot adopt this as the true construction of this 28th section of the statute, but think it to be otherwise; that the person against *whom* the suit must be instituted within the time limited is the one against whom the right of lien may be asserted; that the suit must be instituted against the *creditor* or *incumbrancer* within the six months; that such interpretation accords with the rule of strict construction which has ever been applied to this and like statutes: and where suit is commenced to enforce the lien against the owner, and afterward, upon amendment of the petition, a creditor or incumbrancer is made a party defendant to the suit, that the suit can not be considered as having been commenced against such creditor or incumbrancer until he was so made a party defendant."

Dunphy v. *Riddle*, 86 Ill., 22.

In Missouri, the provisions of a special charter provided that the lien of a special tax bill shall continue for two years but not longer. Suit was brought to collect the same within two years from the issue thereof. The court there held that such statute is not a statute of repose to bar actions, but is rather a limit to the existence of the lien; and so, where an action was commenced within two years against the owner at the time of the issue of the tax bill, and, after the expiration of two years from the date of the tax bill, the petition was amended and the owner at the time of the institution of the suit was then made a party and brought in by summons, it was held that the lien was dead and could not be enforced, and the Illinois cases of *Dunphy* v. *Riddle*, 86 Ill., 22 and *Crowl* v. *Nagle, infra,* were cited with approval.

Smith v. *Barrett,* 41 Mo. Appeals, 460-468.

In another case coming before the Supreme Court of the State of Illinois, a suit was brought against the contracting party to enforce the mechanics' lien within the six months provided by the statute, but incumbrancers were not made parties within the six months, but were brought in later, and it was held that no lien could be enforced as against such new parties as to affect their rights.

Crowl v. *Nagle,* 86 Ill., 437.

It is believed that the Circuit Court of Appeals of the Eighth Circuit, had an analogous case before them in

Denver & R. G. Ry. v. *Wagner,* 167 Fed., 75. The action was brought in Colorado for the death of a passenger, which occurred in New Mexico. The New Mexico statute provided that there should be no such action maintained unless the person claiming damages, within ninety days after the injury shall have been inflicted, shall serve upon the corporation against whom the same is claimed, and thirty days before commencing suit, an affidavit, made before some officer within the territory authorized to administer oaths, in which the affiant shall state his name and address, the name of the person injured, etc., the way or manner in which the injury was caused, and the names and address of witnesses, etc., and unless the persons so claiming the damages shall commence an action to recover the same within one year after such injuries occur.

The court, in passing upon the question, quoted, with approval, from the case of *Swisher* v. *Railway Company,* 76 Kan., 97, 90 Pac., 812, to the effect that the giving of the notice was an essential part of the action, and until such notice was given no right of action existed. The court, in disposing of the case, said:

> "This rule is recognized in *The Harrisburg,* 119 U. S., 199, 7 Sup. Ct., 140, 30 L. Ed., 358, in which it is held that, in an action based on a statute conditioning the right given, it is incumbent on the plaintiff to plead the performance of such condition, and the defendant is not required to plead the limitation in the statute to entitle him to insist upon the objec-

tion that the action was not brought within time, etc. Chief Justice Waite, among other things, said: 'The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right.'

In *Stern* v. *La Campagnie Generale Transatlantique* (D. C.), 110 Fed., 996, it was held that, in an action based on a statute making the giving of such notice and the time of bringing such suit express conditions of the right, it is incumbent upon the plaintiff to plead the performance of such conditions, and the defendant is not required to plead them to entitle him to insist on the objection at the trial.

So Judge Hook, in *Lange* v. *Union Pacific R. Co.*, 126 Fed., 338, 62 C. C. A., 48, 52, said that:

'Failure to give the notice is fatal to the case. The enforcement of the liability of the company was, by the act which created it, conditioned upon the giving of the notice. Without compliance with the condition there can be no enforcement of the liability.' ''

Denver & R. G. R. Co. v. *Wagner,* 167 Fed. (8th C. C. A.), 75-80.

On rehearing, the court used this language:

''Counsel's whole argument in support of the motion for rehearing is based upon a false premise, to-wit: That the provision of the amendatory act

of 1903, requiring the giving of notice within 90 days after the injury, pertains merely to matter of procedure, and was in the nature of a statute of limitation on the right of action; and, therefore, when the statute was disapproved by Congress, it was like a repealing act affecting the remedy, passed while the case is on appeal and before final judgment thereon, either destroying the right of appeal or removing the bar. The Legislature of New Mexico gave to the defendant in error a right of action for damages resulting from death—a right which did not exist at common law. The Legislature which gave that right, by the act of 1903, declared that it could be exercised only on the condition that within 90 days after the given cause of action arose, the plaintiff should give the specified notice. This was a condition precedent to the right of action, the nonperformance of which took away the cause of action. When this injury occurred, and this suit was brought the act of 1903 was a valid law, in force and effect. Under it, when this suit was brought, the plaintiff had no cause of action, as she had not performed the condition precedent. The subsequent disapproval by Congress was prospective only in its operation. It did not have the effect to revivify that which had been dead for two and one-half years."

Denver & R. G. R. Co. v. *Wagner, supra.*

The case of the Harrisburg, referred to in the foregoing quotation from the Denver & Rio Grande case,

was this: The widow and child of Rickords brought action to recover damages for his death, caused by the negligence of the steamer in a collision on the 16th of May, 1877.

The Pennsylvania statutes, which governed, provided:

> "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the husband, widow, children, or parents of the deceased, and no other relative, may maintain an action for and recover damages for the death thus occasioned. The action shall be brought within one year after the death, and not thereafter."

The action was not brought within one year, and the court said:

> "The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise.
>
> The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to suit at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."
>
> *The Harrisburg,* 119 U. S., 199.

In the case of *Stern* v. *La Compagnie, supra,* referred to in the quotation from the Denver & Rio Grande case, *supra,* the action was in admiralty and the libel was filed March 22, 1900, to recover for an injury that occurred May 14, 1898. The action arose in New Jersey waters, and the statute of New Jersey was as follows:

> "And in every such action, the jury may give such damages, etc., provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person."

It was there contended that the one-year proviso of the New Jersey statute was not part or condition of the right of action itself, but it was to be construed as an ordinary statute of limitations as affecting the remedy alone, and hence to be governed by the laws of the forum where the suit was brought, and the suit being brought in New York, it was contended that the ordinary statute of limitations governed. The court said:

> "The proviso is attached as a condition of the right of action itself, and not merely as a designation of the ordinary period of limitation for such actions, operating merely as a part of the New Jersey statute of limitations on the remedy alone. If the latter were the proper construction, it might be subject to the extension provided by the general statute of limitations of New Jersey; but the one year proviso would in that case be operative *ex proprio vigore* in that state alone. On the contrary, however, the proviso must be held to be attached to

the right of action itself; and it must, therefore, run with the statute into every forum wherein any action under the statute may be instituted.

This construction of the statutory proviso was laid down in *Boyd* v. *Clark* (C. C.), 8 Fed., 849, and it was established by the decision of the Supreme Court in *The Harrisburg,* 119 U. S., 199, where the statute under consideration was in substantially the same language as the New Jersey statute. * * * The same general doctrine was applied by this court in *The A. W. Thompson* (D. C.), 39 Fed., 115, 117; and in the case of *Theroux* v. *Railroad Co.,* 64 Fed., 84, 12 C. C. A., 52, it was held that the action would lie in Minnesota, though the two-year limitation of that state had expired, because the statute of Montana, where the death was caused, gave three years, which had not expired; and because the limitation of three years was a part of the statutory right of action, and not a limitation of the remedy merely, and hence, was not governed by the law of the forum like ordinary statutes of limitation. The proviso in question, therefore, is not a part of the statute of limitations, but a condition of the right of action, itself. * * * The answer has not pleaded this condition of the statute; but if the above view is correct, the technical rule as to pleading the statute of limitations is inapplicable. On the contrary, where the plaintiff's right is conditional, in strict-

ness he should plead performance of the condition, unless that otherwise sufficiently appears."

Stern v. *La Compagnie,* 110 Fed., 996.

An analogous suit was before the Fourth Circuit Court of Appeals in a patent case. The statute provided that there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill or the issuing of the writ. The court held that the statute is not a statute of limitations, but a qualification upon the right of recovery, and need not therefore be specially pleaded by the defendant in an action under section 4919, but in view of the fact that the condition is imposed by the statute the plaintiff must allege and prove performance of the condition.

Peters v. *Hanger,* 134 Fed. (4 C. C. A.), 586.

An analogous statute, giving a right of action not existing at common law, was before the Supreme Court of the United States, growing out of customs duties. The statute there limited the time within which the suit could be brought, and the Supreme Court said:

> "The claimant must show not only due protest and appeal, but also a decision on the appeal and the bringing of a suit within the time limited by statute after the decision. * * * The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. The right of action does not exist independently of

the statute, but is conferred by it. There is no right of action on showing merely the payment of the money as duties, and that the payment was more than the law allowed, leaving any statute of limitation to be set up in defense, as in an ordinary suit. But the statute sets out with declaring that the decision of the collector shall be final and conclusive against all persons interested, unless certain things are done. * * * These steps include not only protest and appeal, but the bringing of a suit within the time prescribed."

Arnson v. *Murphy,* 115 U. S., 579.

In the Arnson case, *supra,* the court said that the question was analogous to the question in *Cheatham* v. *United States,* 92 U. S., 85, which arose under a statute in regard to internal revenue taxes. The statute involved in that case provided that no suit could be maintained for the recovery of taxes until after an appeal to the commissioner, and unless suit should be brought within six months, etc. The suit was not brought within the six months. It was urged that the requirements of bringing this suit was a statute of limitations, but the court held (the opinion was by Mr. Justice Miller) that the suit could not be maintained because it was not brought within the six months. The theory was that the Government had prescribed the conditions on which it would subject itself to judgments of the courts, and that the prescription of a time within which the suit must be brought is a condition on which alone the government consents to liti-

gate the matter, and such provision was not a statute of limitations.

Cheatham v. *U. S.*, 92 U. S., 85.

In Indiana the mechanic's lien statute gave one year from the time when notice is filed in the Recorder's office, or if a credit is given, one year from the expiration of such credit, during which time suit may be brought for the enforcement of a mechanic's lien, and it was in the statute expressly provided:

> "If such lien shall not be enforced within the time prescribed by this section, the same shall be null and void."

In a case coming before the Supreme Court of Indiana in 1898, this statute was brought in review, it appearing that as against the owner of the property, the lien had been foreclosed within the statutory time, but the mortgagee had not been made a party, and in passing on *the contention made there as here* the court said:

> "In other words, the year given by statute having expired without a foreclosure of the lien, as against the mortgage, the lien itself and the judgment based thereon must be, as to such mortgage, absolutely void. Equity cannot, as in the case of mortgages, maintain the senior lien on foot after the expiration of the year, when the statute declares it shall be void. By its foreclosure the lienholder, not having made the mortgagee a party, simply stepped into the shoes of the owner of the property; and as such

owner could not question the right of the mortgagee to foreclose against the property, neither can the lienholder now do so,—the year given him by statute to foreclose his lien having expired."

Deming-Colburn Lumber Co. et al. v. *Union Nat. Savings & Loan Assn.,* 51 N. E., 936.

And in another case coming before the Supreme Court of Indiana, decided in 1898, a similar question was raised. Here one Helberg had executed a mortgage on a piece of property, improvements on which were under construction. The material man and laborer took the necessary steps to procure a mechanic's lien and, within the time limited by the statute, brought suit to foreclose the lien, but did not make the mortgagee a party, and later, just as in this case, purchased the property at foreclosure sale. Afterwards the mortgagee brought suit to foreclose the mortgage, and the question arose as to whether or not the lien as to the mortgagee had expired. In that case, the court, after quoting the statute above referred to, said:

"It will thus be seen that the remedy is limited to one year, and, if the complaint is not filed during that period, the lien is void. We have seen also that the remedy as against Helberg, the owner of the property, was enforced within the year. Does the statute require that the remedy shall be enforced also against existing junior lienholders, within the year, to save the validity of the senior lien? The requirement of the statute is general, and contains

no exception applicable to this case. Its object was to prevent the *ex parte* incumbrance from beclouding titles, and embarrassing dealings with reference to the property, for a longer period than one year. This object cannot be said to concern the property owner alone, for the junior encumbrancer is interested in having the lien determined while the extent of labor or materials may be more easily ascertained and while values, as to the lien, may not become obscure, and, as to the property, may not become impaired. A foreclosure as against the junior lienor alone, could hardly be said to satisfy the statutory requirement if objection were made by the property owner. If, upon such foreclosure, the year having expired, the owner could assert the invalidity of the lien, it would seem that the rule should also be upheld that a foreclosure against the owner alone would not preclude the junior lienor from asserting the invalidity of the lien as against his lien. * * * If the analogy is fair, and we think it is, we may say that the foreclosure by Mosier (the mechanic's lienor) was as to the appellant (the mortgagee) as no foreclosure, and did not preclude or estop the appellant to deny the validity of the lien under the provisions of the statute. * * * While we hold that the failure to make the appellant (the mortgagee) a party to his foreclosure lost to Mosier (the mechanic's lienor) the seniority of his lien, we do not hold that his foreclosure was entirely fruitless. It had the effect to

place Mosier in the shoes of Helberg (the mortgagor), and to carry to him the equity of redemption."

Union Nat'l Bank v. *Helberg,* 51 N. E., 916.

In another Indiana case cited by Judge Diedrich in his opinion in this case, as supporting his conclusion, a mortgage had been executed in 1890 to a savings bank. Subsequently a mechanic's lienor having taken the requisite steps to obtain a mechanic's lien, brought his action to foreclose the lien within the time limited by statute as above quoted, but did not make the savings bank a party. The question having arisen as between the savings bank, the mortgagee and the mechanic's lienor after the limitation of one year, which was contained in the statute as part of the right, had expired, the court on the authority of the Helberg case, *supra,* and the Deming case, *supra,* reached the same conclusion and held the lien absolutely void.

Stoermer v. *People's Savings Bank,* 52 N. E., 606.

In another case cited by Judge Dietrich in his opinion in the instant case, as supporting his conclusion, this situation arose in Nebraska. Certain materials were furnished by one Green under a verbal contract with Jacob Dishong for the erection of a dwelling on lands owned by Sanford—Dishong being in possession through a contract between his wife and Sanford, the owner. Sanford was not made a party to the mechanic's lien pro-

ceedings brought by Green until long after the expiration of the two years limited by the Nebraska statute for the enforcement of such a lien, though the other parties were so made parties. It was contended that it was sufficient to institute the action within the time limited by the statute as against Dishong, who was in possession, and the court after referring to the case of *Manley* v. *Downing,* 15 Neb., 637, 19 N. W., 601, where it had been held that other parties could be brought in after the two years, expressly overruled that holding and said:

> "It is manifest that the only way a mechanic's lien can be continued in force beyond the two years is by instituting a suit within that time to enforce the lien, and the plain meaning of the statute is that it is only preserved as to the persons who are made parties to the suit prior to the limitation of the time for the bringing of such an action. A person who is not a party to suit ordinarily is not bound by the adjudication, nor is a suit deemed commenced against one until he is made a party to it; and where, in an action to enforce a mechanic's lien, the plaintiff by amendment of his petition, as in the case at bar, brings in a new party after the limitation of two years has run as to such new party, the suit is barred. * * * The rule governing the time an action is to be considered commenced as to persons made defendants after suit is instituted to enforce a mechanic's lien is not different from that which obtains in mortgage foreclosures and other cases. So

far as we are able to discover, all the authorities, with the single exception of *Manley* v. *Downing, supra,* affirm the doctrine that where, after a suit has been commenced, a new defendant is brought in after the expiration of the period limited by the statute for bringing the action as to such defendant, the suit is barred. Phil. Mech. Liens, Sec. 431; Angel, Mech. Liens, Sec. 330; Story, Eq. Pl., Sec. 904; *Miller* v. *McIntyre,* 6 Pet., 61; *Brown* v. *Goalsby,* 34 Miss., 437; *Gorman* v. *Judge,* 27 Mich., 140; *Dunphy* v. *Riddle,* 86 Ill., 22; *Crowl* v. *Nagle,* 86 Ill., 437; *McGraw* v. *Bayard,* 96 Ill., 146; *Railroad Co.* v. *Culbertson* (Tex. Sup.), 10 S. W. Rep., 706; *Telfener* v. *Dillard* (Tex. Sup.), 7 S. W. Rep., 847; *Jones* v. *Johnson* (Ga.), 6 S. E. Rep., 181; *Bell's Appeal* (Pa. Sup.), 8 Atl. Rep., 177."

Green v. *Sanford,* 51 N. W., 967.

The same doctrine was again announced by the Supreme Court of Nebraska, in another case cited by the court below in support of his opinion, and it was there said that the question must be regarded as settled by *Green* v. *Sanford.*

Ballard v. *Thompson,* 58 N. W., 1133.

And in a late Missouri case cited by Judge Dietrich there was brought into review the Missouri statute with reference to mechanic's liens, which provided:

"That all actions under this article shall be commenced within ninety days after filing the lien * * *

and no lien shall continue to exist by virtue of the provisions of this article for more than ninety days after the lien shall be filed, unless within that time an action shall be instituted thereon, as hereinabove prescribed.''

The court said:

''The right to a mechanic's lien is purely statutory and while the rule is well established that the statutes giving the right are to be liberally construed, the right itself cannot be enlarged beyond the reasonable scope of the statute. We agree with what was said by the St. Louis Court of Appeals in *Fury* v. *Boeckler,* 6 Mo. App., 24: 'The proceeding is special and the person who claims under it must bring himself within its special provisions. The 90 days after which no lien is to continue to exist unless the conditions of the law are complied with are not provided as a period of repose to bar actions; on the contrary, they are a limit to the existence of the lien.' If the plaintiff failed to bring his suit within 90 days after filing of the lien, his lien is lost; and it may be considered as settled in this and other jurisdictions that the lien is preserved beyond the period of 90 days only as to those parties who are made defendants in a suit brought within that period. After its expiration, new parties cannot be introduced by an amendment to the petition. * * * It may be true that it is optional with the lien claimant whether or not parties inter-

ested in the property at the time of the creation of the lien other than the parties to the contract be made defendants in a suit brought by him; but if such parties are not made defendants, they are not bound by the proceedings, and, as we have said, they cannot be brought into the action after the expiration of the time fixed by the statute."

Badger Lumber Co. v. *Staley* (K. C. Ct. of App.), 125 S. W., 779.

We believe the Minnesota cases and the Illinois cases referred to by the lower court are sufficiently referred to above.

The Illinois cases cannot be disposed of by what counsel has said on page 47 of the brief, of an anomalous situation there presented, for the reason that the Illinois statutes, when critically examined, show, that unlike mechanic's lien statutes in some jurisdictions, there is no priority allowed to the lienor by reason of his having filed his mechanic's lien at an earlier date than another mechanic's lienor; and the statute requires that in every mechanic's lien suit, other mechanic's lienors must be made a party. Hence the apparent anomalous situation referred to in the Granquist case and the Porter case ceases to be anomalous. The reversal there doubtless worked a hardship, but that hardship is not comparable to the confusion that would have arisen from any other holding.

II.

Referring to the question mentioned by counsel with reference to the construction of mechanics' lien statutes, we believe it is now well settled in the courts, and especially in this circuit, that such statutes should have a fairly liberal construction; but in as much as the mechanics' lien is purely a statutory creation, the one seeking the benefit thereof must keep well within the provisions of the statute. Thus, in a case coming before this court, the question arose as to how such statutes should be construed, it being urged upon this court that they should adopt a liberal rule, and even take into account equitable rights, and thereupon the court said:

> "The evident spirit and purpose of the act (a mechanics' lien act), is to do substantial justice to all parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality. (Citing *Springer* v. *Ford,* 168 U. S., 513; *Salt Lake* v. *Chainman,* 128 Fed., 509; *Hooven* v. *Featherstone,* 111 Fed., 81.) But in following this rule courts should always be careful not to impair the force of the statute or fritter away its meaning by construction. (Citing *Davis* v. *Alvord,* 94 U. S., 545; *Malter* v. *Falcon,* 18 Nev., 209, 2 Pac., 50.) A mechanics' lien is purely of a statutory creation, and can only be maintained by a substantial observance and compliance with the provisions of the statute. Whatever is made necessary to the existence of the

lien must be performed, or the attempt to create it will be futile. A substantial adherence to the terms of the statute in the notice of the lien is indispensable. (Citing Phillips on Mechanics' Liens, 3d Ed., Sec. 9.)"

Russell v. *Hayner,* 130 Fed., 90.

And in the last above cited case, it was held that the petitioner seeking to foreclose a mechanics' lien did not show a compliance with the statute, and the court refused to entertain the bill for that purpose, and it was dismissed.

Russell v. *Hayner, supra.*

In a case arising in Nebraska, which went up to the Circuit Court of Appeals in the 8th Circuit, a Nebraska statute was before the court, which provided:

"that such lien shall continue for the period of two years * * *; and when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit or suits be finally determined or satisfied."

The court said:

"The labor and material bestowed upon a building or a railroad by a contractor enhance the value of the property of the owner, and become lost to the builder. If he receives no compensation for them, he never can take them back, but the owner and those who take under him receive all their benefits. It is therefore just and equitable that the laborer and

material man should have a lien for their wages, and for the value of their materials, upon the improvements which they construct; and statutes which authorize such liens should be liberally construed, to advance this reasonable and salutary remedy. Nevertheless, the mechanics' lien does not exist under the common law. It is the creature of the statute which establishes it, and must stand or fall by the law of its creation."

Reynolds v. *Manhattan Trust Co.* (27 C. C. A.), 83 Fed., 593.

In the above mentioned case the work was completed October 1, 1899, and the cross bill to foreclose it was filed November 2, 1901, more than two years after the completion of the work, and the court, continuing, said:

"Our conclusion, is that the true construction of this section 2171 is that the lien of the railroad contractor continues two years, and no longer, from the time when the last act is done in the performance of the contract, from the time when the lien first becomes determined in amount, complete and actionable. The lien under the first contract had, therefore, expired two months before the cross bill was filed, and the claim for this lien was properly dismissed."

Reynolds v. *Manhattan Trust Co., supra.*

From the foregoing cases, and on principle, it seems too clear for argument that the time limited for the insti-

tution of proceedings to enforce a mechanics' lien is a part of the right, and as against anyone who has an interest in contesting the lien the action must be commenced within the period limited by the statute. Referring back to the reasoning in the Bartz case (118 Pacific, 334) the very purpose of the statute was to require the mechanics' lienor to bring his suit, while the evidence upon which it rests is received to enable any party interested to successfully contest the lien. Surely such right to contest the lien is just as valuable to an encumbrancer as it is to the owner of the property.

III.

If, too, we are correct in our proposition as above set forth, that the time limited for the foreclosure of a mechanics' lien—such time being limited by the statute which creates the right—is a part of the right and is not a statute of limitations affecting the remedy only, it necessarily follows from the cases above referred to that it was not requisite for the appellee to plead the failure to institute the action within the time limited. On the other hand, as pointed out in the Harrisburg case, *supra*, and kindred cases, one seeking to avail himself of a right given by statute in derogation of the common law must allege and prove the doing of that on which the right is made to depend.

We confidently assert, therefore, that under this record the court was amply justified in determining the ques-

tion against the appellee without going into the question at all as to whether or not the lien of the appellee was superior to the lien of the appellant. Manifestly, the court, instead of looking to the question of the priority of the two rights, found no occasion to determine any question of priority, because before he reached that question he found that, as against the appellant, the appellee had no lien. How, then, can it be said, as counsel remarks on page 16 of the brief, that the court below conceded the priority of appellant's lien? The court found there was no lien. Therefore, he could not have conceded its priority.

IV.

THE LIEN OF APPELLEE IS SUPERIOR TO THE MECHANICS' LIEN OF APPELLANT.

This is the converse of the proposition which we stated above the appellant must maintain in order to succeed before this court. Its discussion is necessary only in the event the court should find that our contention that the appellant's lien had expired by its own limitation is unsound. In the event of such holding by this court, then it would become necessary to inquire into the question of priority between the mechanics' lien and the lien of the trust deed.

The trust deed having been of record, and being concededly valid, created a lien upon everything upon which it operated on the date of its recordation, to-wit: March 19, 1909.

Confessedly, the appellant did no work on the enterprise and furnished no material for the enterprise until the 13th day of July, 1909.

Section 5114 of the Idaho statutes, set out on page 55 of the appellant's abstract, shows that mechanics' liens in Idaho take preference to mortgage which attached subsequent to the time when the work was done by the laborer or material was furnished by the material man, and also takes priority to the lien of a mortgage which was unrecorded.

It seems to follow, therefore, from the statute that a mortgage which had attached prior to doing the work or furnishing the material, and which was recorded, takes priority over the mechanics' lien.

Now, what is the contention of the appellant for his claim to priority? Manifestly it is based solely and only upon the claim that the right of way for ditches was acquired by the Irrigation Company by virtue of the furnishing of this material by the appellant for the two small pipe lines which were built and which were not a part of the original enterprise.

It seems to us that the proposition need only be thus stated to show its fallacy. The evidence fails to show that the pipe line was in fact constructed over property, the title to which remained in the United States. The very contract between the State of Idaho and the Irrigation Company which is before the court provides that the State grants to the Company a right of way over the lands. The whole argument for counsel for appellant

for priority of the mechanics' lien rests upon *Bear Lake* v. *Garland*, 164 U. S., 1; but when the facts as here proven are considered they fall far short of coming within that case. The contract here between the Irrigation Company and the State was entered into on May 1st, 1908, and, as above pointed out, the trust deed, constituting a lien, was of record March 19, 1909. The supplemental trust deed provided that the bond could not be certified or delivered until certain officers of the Kings Hills Company furnished sworn evidence of the completion of the system to an extent sufficient to deliver water to the lands embraced in the water contracts, and the record shows that such evidence was furnished and that the Trustee actually certified bonds prior to July 1st, 1909, which could not be done unless the system was completed so as to deliver water to the lands under it to the extent required by the supplemental trust deed, and this was all prior to the furnishing of any material or the doing of any labor by the appellant.

And, too, as above pointed out, the material furnished by the appellant was used for the two small laterals, one known as the Kings Hill syphon, which carries the water across Snake River into Elmore County for irrigating lands in the townsite of Kings Hill and vicinity, which lands were no part of the irrigation project as originally contemplated, and as contracted for with the State. The balance of the material was furnished for the so-called Tuana Gulch branch which was a small lateral.

There is absolutely no evidence that any part of the

system was constructed over Government land, or land to which both the legal and equitable title still stood in the United States Government. The Kings Hill syphon was constructed over private land, as above pointed out, and while it may be that the Tuana Gulch syphon was constructed over Carey Act land, there is not the slightest evidence to show that the title to the right of way was acquired solely because the pipe line was so constructed, and thus bring the instant case within the Bear Lake case.

There can, therefore, be no foundation for the contention that the title to the entire irrigation system was dependent upon the construction of the two small pipe lines for which appellant furnished material, and that such title vested in the Kings Hill Company because of the construction of the pipe lines.

We confidently assert, therefore, that the decree of the trial court was right and should be affirmed on the ground on which the decision was grounded by the lower court; and, further, that in event such ground was not sound, then on the proposition that the lien of the trust deed was, in fact, superior to the mechanics' lien.

Respectfully submitted,

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